IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Madam Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Shamsul Huda

CIVIL APPEAL NOS. 148-49 OF 2007
(From the judgment and order dated 7th July, 2004 passed by the High Court Division in First Appeal Nos.48 and 49 of 2002)

Mahua Khair ... **Appellant**
(in both appeals)

= Versus =

Amena Begum Ali Ispahani ... **Respondent**
(in both appeals)

For the Appellant (in both appeals)	**:Mr. Rafique-ul-Huq with Mr. Mahmudul Islam, Senior Advocates (Mr. Ahsanul Karim, Advocate with him) instructed by Mr. Mahbubur Rahman, Advocate-on-Record**
For Respondent (in both appeals)	**:Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Mrs. Sufia Khatun Advocate-on-Record**
Date of hearing	**:The 10th January, 2012**

J U D G M E N T

MUHAMMAD IMMAN ALI, J:-

Civil Appeal Nos.148 and 149 of 2007, both by leave of this Division, are directed against the judgment and decree dated 7.7.2004 passed in First Appeal Nos.48 and 49 of 2002 respectively by a Division Bench of the High Court Division reversing the judgment and decree dated 07.08.2001 in Title Suit No.3 of 1998 and reversing the judgment and decree in Title Suit No.4 of 1998 passed by the Subordinate Judge (now Joint District Judge), Additional Court, Dhaka.

Both the appeals arise out of litigation between the same parties concerning land situated at Plot No.6, Block No.NW(A), Road No.69, Gulshan Model Town, Dhaka. Title Suit No.3 was filed by the owner of the property seeking a declaration that the cancellation of the agreement of sale is valid and binding, whereas Title Suit No.4 was filed by the Purchaser for specific performance of the said agreement. The two title suits were heard analogously and disposed of by a single judgment; the two First Appeals arising therefrom were heard together and disposed of by the single judgment impugned herein. Hence, both the appeals were heard by this Division simultaneously and are disposed of by this judgment.

The facts leading to the litigation may be stated briefly as follows:

The plot of land in dispute measures one bigha ten kathas, and five chataks and has structures standing thereon. Amenah Begum Ali Ispahani owned and possessed the same by way of a registered deed of lease dated 18.06.1966 executed between herself as lessee and the Dhaka Improvement Trust (now RAJUK), as the lessor. The lessee constructed a single storied building upon the said plot. On 18.12.1986 Amenah Ispahani (hereinafter referred to as the "Vendor") entered into an agreement for sale of the property (hereinafter referred to as the "agreement for sale") to Mahua Khair (hereinafter referred to as the "Purchaser") for an agreed consideration of

Tk.42,50,000/- (Taka forty-two lacs fifty thousand). The initial down payment of Tk.20,00,000/- (Taka twenty lacs) was paid at the time of execution of the deed of agreement for sale.

The relevant clauses of the Agreement for Sale of the Immovable property dated 20.12.1986 may be re-produced below:

> **"1. The Vendor-First Party hereby agrees to complete the sale of schedule property by a duly executed and registered Deed of Sale within one year of the date hereof and the Purchaser-Second Party hereby agrees and undertakes to pay to the Vendor-First Party the said price of Tk. 42,50,000.00 (Taka forty two lacs fifty thousand) only within the said one year. The Purchaser-Second Party has paid the Vendor-First Party a sum of Tk.20,00,000.00 (Taka twenty lacs) only by a cheque dated 18.12.1986 drawn on Arab Bangladesh Bank Ltd. as initial down payment.**
>
> **2. That within the stipulated period of one year the Purchaser-Second Party on behalf of the Vendor-First Party shall move the appropriate Income Tax Authority and obtain an Income Tax Clearance Certificate as required by section 184 of the Income Tax Ordinance of 1984. It is clearly understood by the parties hereto that the payment of**

Capital Gains Tax and all incidental expenses shall be entirely the responsibility of the Purchaser-Second Party and the Vendor-First Party shall make no payment whatsoever on this account. It is specifically mentioned herein that the Gains Tax paid by the Purchaser-Second Party shall not be deducted from the consideration money.

3. That the Purchaser undertakes to pay the stamp duty for the Sale Deed under Article 23 of Schedule 1 of the Stamp Act, 1899 as amended up to date and that the payment of stamp duty being entirely the responsibility of the Purchaser-Second Party and the Vendor-First Party shall make no payment whatsoever on these two accounts.

4. It is further understood by the parties hereto that the registration fees and transfer fee payable to DIT shall be paid by the Purchaser-Second Party and the Vendor-First Party shall make no payment whatsoever on these two accounts.

5. That even if after receipt of Income Tax Clearance Certificate and the payment of all these, the Purchaser-Second Party fails to pay the purchase price as stipulated herein above to the Vendor-First Party and

this agreement cannot be supplemented (sic) by the Vendor-First Party due to the Purchaser-Second Party's default, the Purchaser-Second Party shall be liable to pay liquidated damages to the Vendor-First Party of a lump sum amount of Tk. 5,00,000.00 (Taka five lacs) only.

6. That the Sale Deed shall be prepared by the Purchaser and shall be stamped for execution only after it is approved by the Vendor".

The Vendor, being an Iranian national, obtained permission from Bangladesh Bank on 09.02.86 to sell the property. According to the Vendor, the Purchaser was in possession of the property since 1985 and the deed of agreement for sale was executed on 20.12.1986. According to the Purchaser, the possession of the property was handed over after the execution of the said deed of agreement. The Purchaser was unable to obtain the Income Tax Clearance Certificate within the one year stipulated in the deed of agreement for sale but did make a further payment of Tk.15,00,000/- (Taka fifteen lacs). Since the Purchaser could not obtain the Income Tax Clearance Certificate and did not get the deed of sale executed and registered, the Vendor sent a legal notice dated 08.07.1993 acknowledging part payment of Tk.35,00,000/- towards the purchase price. The Purchaser was requested to pay the due balance of Tk.7.5 lacs, Tk.5,00,000/- in respect of

liquidated damages stipulated in Clause 5 of the agreement for sale and Tk.13,69,660/- by way of interest accumulated between 01.01.1987 to 31.06.1993. It was stated that failure to pay the said sum of money within one month would be deemed to be confirmation that the Purchaser wished to cancel the said agreement.

In response the Purchaser wrote a letter on 31.10.1993 stating that she was willing to pay the outstanding balance of the purchase price on receipt of certain papers relating to the property, viz. (a) copy of the lease agreement with DIT, (b) letter of permission from Bangladesh Bank for sale of the property and (c) approved copy of plan from DIT. On 15.02.1994 the Vendor received from the Purchaser another sum of Tk.15,00,000. On 29.07.1996 the Vendor sent another legal notice to the Purchaser terminating the agreement for sale and requesting the Purchaser to handover possession of the property within three days.

Thereafter, the Vendor filed Title Suit No.136 of 1996 in the Court of 4th Subordinate Judge (now Joint District Judge), Dhaka on 6.8.1996 which was renumbered as Title Suit No.28 of 1997 and again renumbered as Title Suit No.3 of 1998. The suit was filed for declaration that the cancellation of the agreement for sale by the Vendor was proper, valid and binding upon the parties; a decree for khas possession of the suit property; a decree for Tk.44,10,000/- on account of rent at the rate of Tk.35,000/- per month

from June 1985 to July 1996 and declaration that the plaintiff is entitled to receive rent at the rate of Tk.50,000/- per month from August, 1996 till the defendant vacates the suit property.

On the other hand, the Purchaser filed Title Suit No.173 of 1996 on 17.09.1996 which was numbered as Title Suit No.29 of 1997 in the Court of 1st Subordinate Judge (now Joint District Judge) and Artha Rin Adalat, Dhaka, which was later renumbered as Title Suit No.4 of 1998. In her suit, the Purchaser as plaintiff prayed for specific performance of contract embodied in the Agreement for Sale.

The learned Subordinate Judge (now Joint District Judge), Additional Court, Dhaka heard both the suits analogously and by his judgment dated 7.8.2001 dismissed Title Suit No.3 of 1998 of the Vendor and decreed Title Suit No.4 of 1998 of the Purchaser allowing specific performance of contract on condition of payment by the Purchaser a total of Tk.28,25,000/- to the defendant within 60 (sixty) days and to obtain execution and registration of the deed of sale failing which the kabala would be executed and registered through Court. If the plaintiff failed to pay the said sum of money to the defendant within the stipulated time, then Title Suit No.4 of 1998 would be deemed to have been dismissed, in which event the plaintiff would be entitled to get back Tk.35,00,000/- which he had paid to the defendant towards the purchase price.

The Vendor then preferred First Appeal No.48 of 2002 against the judgment in Title Suit No.3 of 1998

and also First Appeal No.49 of 2002 against the judgment and decree in Title Suit No.4 of 1998. Both the First Appeals were heard analogously by a Division Bench of the High Court Division which by the impugned judgment and decree dated 07.07.2004 reversed the decision of the trial Court, allowing both appeals holding that the termination notice dated 29.07.1996 of the plaintiff, which was the subject matter of Title Suit No.3 of 1998, was proper, valid and binding upon the parties and that the suit be decreed for khas possession of the suit property in favour of the plaintiff (Vendor). The judgment and decree passed in Title Suit No.4 of 1998 was set aside and the plaintiff in that suit (Purchaser-respondent in the appeal) was directed to hand over vacant possession of the suit property to the appellant within three months, failing which the appellant would be entitled to recover possession through Court.

Being aggrieved by and dissatisfied with the judgment and decree of the High Court Division, the Purchaser filed Civil Petition for Leave to Appeal Nos.241 and 242 of 2005 against the judgment of the High Court Division in First Appeal Nos.48 and 49 of 2002 respectively. By an order dated 29.07.2007, this Division, having heard both the leave petitions, granted leave to consider (i) whether the High Court Division acted illegally in not considering the fact that the petitioner had paid full consideration money for the disputed property before the contract was

terminated on 29.07.1996 and also paid an amount of Tk.28,25,000.00 (Taka twenty eight lacs twenty five thousand) as per direction of the trial Court; (ii) whether in a suit for specific performance of contract, time is not of the essence especially when liquidated damages are payable for any delay on the part of the Purchaser and (iii) whether the possession of the property having been delivered to the Purchaser upon execution of the agreement for sale, and the Purchaser having paid full consideration value of the property before the contract was terminated, and having invested huge amount of money for erecting building thereon, the Purchaser is protected under section 53A of the Transfer of Property Act, and as such the judgment and decree of the High Court Division is liable to be set aside.

The appellant in both appeals was represented before us by Mr. Rafique-ul-Huq, learned Senior Advocate with Mr. Mahmudul Islam, learned Senior Advocate and Mr. Ahsanul Karim, learned Advocate. The respondent in both appeals were represented by Mr. Abdul Wadud Bhuiyan, learned Senior Advocate.

Mr. Mahmudul Islam, the learned Counsel for the appellant submits that in a contract for sale of immovable property time is not of the essence, especially when liquidated damages are stipulated as a term of the contract for any breach in concluding the contract within the time stipulated therein. He further submits that since the appellant (Purchaser)

had paid all the consideration money as well as liquidated damages stipulated in the agreement and has been in possession of the disputed property, the Vendor most illegally terminated the agreement. He also submits that there being no clause in the agreement allowing termination of the same, and liquidated damages having been paid as stipulated, the subsequent unilateral ultimatum in the legal notice dated 09.07.93 does not give any right to the Vendor to terminate the agreement for sale. He next submits that under section 35(c) of the Specific Relief Act, the seller could have sued to rescind the contract only if the Purchaser defaulted in payment of the agreed purchase money. He points out that in the instant case the Purchaser paid Tk.20,00,000/- at the time of execution of the deed of agreement for sale, Tk. 15,00,000/- on 15.02.1994 and the balance amount of Tk.7,50,000/-, as well as the liquidated damages of Tk.5,00,000/- before the contract was terminated. He points out that the Purchaser paid into Court the full amount as ordered by the Court, including compensation in accordance with the decree of the trial Court. The learned Counsel further points out that the deposition on behalf of the Vendor is that $9\frac{1}{2}$ years were extended for completion of the deed of sale, which is consistent with the claim of the Vendor in her plaint and as such the Purchaser was not in default even up to the time of cancellation of the agreement.

Mr. Abdul Wadud Bhuiyan, the learned Counsel for the respondent submits that the suit for specific performance of contract was barred by limitation, since Article 113 of the Limitation Act provides that a suit for specific performance of contract had to be filed within three years from the date fixed for performance or from notice of refusal. He points out that in the instant case, the date for performance of the contract was within one year from its execution, i.e. within one year from 20.12.86. He submits that, therefore, the suit having not been filed within three years from 20.12.87, it is barred by limitation. Alternatively, learned Counsel submits that if the date of completion of the contract is taken to be one month from the legal notice dated 08.07.93, then the suit for specific performance of contract ought to have been filed within three years from 8.8.93 and, therefore, the suit, which was filed on 17.09.96, is barred by limitation. The learned Counsel submits that the balance of the consideration money was never paid by the Purchaser, and any suggestion that the payment was made to the learned Advocate Salah Uddin within the stipulated period is not supported by the evidence and is also contrary to the terms of the contract, which clearly stipulated that the balance purchase price was to be paid to the seller. The learned Counsel points out that the Purchaser has nowhere specified when he made any payment to Advocate Salah Uddin and the letter from the latter to the Purchaser

allegedly returning Tk.13,00,000/- is evidence of the Purchaser's collusion with Advocate Salah Uddin. He submits that if any amount was paid to Advocate Salah Uddin, then it must have been paid after the termination notice and certainly not within one month of the legal notice dated 08.07.1993. He points out that the letter of the Purchaser dated 31.10.1993 does not mention any amount of money having been paid to Advocate Salah Uddin.

The learned Counsel for the Vendor submits that even if it is assumed that time was not of the essence of the contract, the Purchaser was bound to perform her part of the agreement within a reasonable time. In support of his contention, he has referred to the decision reported in 5 BLD (AD) 51. He also referred to an unreported decision of this Division in Civil Petition for Leave to Appeal No.360 of 2000 (judgment delivered on 18.04.2001) and the case of Manjunath Anandappa Urf Shivappa Hanasi vs. Tammanasa and others reported in 10 SCC 390. The learned Counsel points out that the Purchaser had ample time and opportunity within which to perform her part of the contract, and having failed to do so, he cannot be entitled to a decree of specific performance of contract.

At the outset, we note that the agreement for sale is quite unusual, inasmuch as there is no termination clause. Generally, agreements for sale of property include a clause whereby in case of non-performance, or after the passage of a specified period of time, the contract would either be deemed to

have been terminated or would be determined at the behest of a party to the agreement. In the instant case, Clause 1 of the agreement dated 18.12.1986 provides that the sale of the schedule property would be completed within one year upon receipt of the full purchase price as agreed between the parties, Tk. 20,00,000/- of which was paid by cheque dated 18.12.86. Clause 2 of the contract provides a reciprocal promise to the effect that the Purchaser on behalf of the Vendor shall obtain the necessary Income Tax Clearance Certificate from the Income Tax Authority as required by section 184 of the Income Tax Ordinance, 1984. Although under the relevant law it is the duty of the seller to obtain the said certificate and to pay capital gains tax, the parties to the contract have agreed to deviate from the requirement of the law. Since the State does not lose out as a result of this deviation, such an agreement cannot be said to be illegal. The interest of the State is to receive a portion of the gain made as a result of the sale of the property, and also to receive the due stamp duty and other due taxes on account of the transfer and registration. If the deal is at arms length, and is not otherwise illegal, then shifting the burden of the tax and other duties by mutual agreement cannot be said to be illegal or unlawful. In the instant case, the only sanction provided by the agreement in case of any delay by the Purchaser to conclude the contract is found in Clause 5 wherein it is stipulated that even if after receipt of the Income Tax Clearance Certificate and the payment of the due taxes and fees, the Purchaser fails to pay the

purchase price to the seller and the contract cannot be completed by the seller due to the fault of the Purchaser, then the Purchaser shall be liable to pay liquidated damages to the seller, a sum of Tk.5,00,000/-. Essentially, what that means is that if all the other conditions are fulfilled but due to the fault of the Purchaser in paying the seller the full purchase price, liquidated damages would become payable.

The reciprocal promise of obtaining the Income Tax Clearance Certificate by the Purchaser was not fulfilled within the one year period stipulated for completion of the sale of the property. In his deposition the witness for the Purchaser alleged that in order to obtain the Income Tax Clearance Certificate, it was necessary for the seller to sign a Form but several attempts by the Purchaser to get the Form signed by the seller were fruitless. D.W.1 (deposing on behalf of the Purchaser) stated that he approached the seller as well as her engaged lawyer in this regard. On the other hand, the witness deposing on behalf of the seller denied that any approach was made to the seller with regard to the Income Tax Form. Neither party produced any corroborative evidence to support their statements. In any event the need to obtain the Income Tax Clearance Certificate was abolished by law as from 30.06.1992, when section 184 of the Income Tax Ordinance, 1984 was abolished by section 8(21) of the Finance Act, 1992 (Act No.21 of 1992). However,even at this point the Purchaser did

not take any step towards completion of the contract even when the need to obtain the said certificate no longer existed. Hence, in our view the liquidated damage is payable by the Purchaser.

One other aspect that we find noteworthy in this case is that neither party appeared to be diligent or overly eager in completing the sale of the suit property. The stipulated period of one year within which to conclude the sale ended on 19th December, 1987. From the record we do not find evidence of any action taken by either party immediately or soon thereafter. We do not find any tangible evidence that the Purchaser contacted the Vendor, for example by way of written request, to provide necessary cooperation of the Vendor in order to obtain the Income Tax Clearance Certificate. On the other hand, we also do not find any evidence on the part of the Vendor to show that after the stipulated one year period she made any approach in writing to encourage the Purchaser to conclude the sale. The law with regard to getting the necessary Income Tax Clearance Certificate was amended on 30.06.1992 by section 8(21) of the Finance Act, 1992 (Act No.21 of 1992). From then on it was necessary only to pay 6% of the sale price at the time of registration. Quite clearly the Purchaser, had she been diligent and willing to conclude the sale, could have prepared the deed of sale and approached the Vendor for execution and registration of the same. However, the evidence shows that no steps were taken

at any time by the Purchaser even to procure the necessary stamp paper for the sale deed.

The Vendor also took no steps to rescind the contract or to approach the Purchaser to conclude the sale of the property. One year after the repeal of the law requiring Income Tax Clearance Certificate, on 8.7.93 a legal notice was sent to the Purchaser by the Advocate of the Vendor stipulating a period of one month within which to conclude the sale and also demanding payment of liquidated damages of Tk.5,00,000/- along with the balance purchase price and interest thereon. By this action, therefore, the Vendor had waived any right to seek rescission of the contract for failure of the Purchaser to conclude the sale within the one year stipulated in the agreement.

The ultimatum given by the seller to conclude the sale within one month was evidently not heeded by the Purchaser. It appears that the Purchaser wrote a letter to the Vendor's lawyer after the deadline on 31.10.93 expressing her willingness to pay the balance outstanding and to conclude the sale on condition of receipt of certain papers detailed in that letter. These papers, in our view, have no bearing with regard to the sale of the property. They are not essential papers in connection with the execution and registration of the sale deed. However, the Vendor did not take issue save to say that the planning permission for the building was lost even before the execution of the agreement for sale, which was known

to the Purchaser and the other two papers requested, namely the permission from the Bangladesh Bank and document relating to the lease of the property, had been given to the Purchaser at the time of execution of the agreement for sale. Nevertheless, even at this stage, in October 1993, the Vendor took no steps to rescind the agreement for sale. On the contrary, the depositions of the witnesses indicate that the Purchaser paid Tk.15,00,000/- on 15.02.1994, which the Vendor received and accepted. We should point out that there is some incongruity in the claim that Tk.15,00,000/- was paid on 15.02.1994 since the first legal notice dated 8th July, 1993, sent by the Advocate of the Vendor stated that Tk. 35,00,000/- towards the purchase price had already been received. An explanation for this anomaly may be that the cheque for Tk.15,00,000/- had been received by the Vendor prior to 8th July, 1993 but was not encashed until 15.02.1994 due to insufficiency of fund in the Purchaser's account. This finds support from the deposition on behalf of the Vendor.

Be that as it may, the seller in accepting the Tk.15,00,000/- had effectively extended the period for performance of contract. Even the subsequent legal notice dated 29th July, 1996 discloses a gap of more than two years in which the Vendor took no action to rescind the agreement for sale.

In view of the above sequence of events, the argument put forward by the learned Counsel for the

respondent (Vendor) that the suit for specific performance was barred by limitation cannot be sustained. The preponderant view, as may be seen from the decisions referred to us, is that in the case of sale of immovable property time is not of the essence unless specifically stipulated by the parties. In the instant case, although a period of one year for completion of the sale was stipulated, sanction for non-compliance with this term of the agreement was payment of liquidated damages of Tk.5,00,000/-. Nowhere in the agreement is it mentioned that the agreement would either stand cancelled or be liable to be cancelled in the event of any breach of the terms of the agreement. This is an unusual aspect of this particular agreement, but it is one to which the parties have consciously agreed.

The learned Counsel for the respondent has argued that the agreement was required to be concluded within a reasonable time after the one year stipulated in the agreement. In the instant case, it appears that the contract could not be concluded even within a period of nine years and nine months. It is for this reason and by reference to Article 113 of the Limitation Act that the learned Counsel for the respondent submits that the suit for specific performance was barred by limitation. However, from the sequence of events narrated above, it appears that at every stage when the law of limitation could have been invoked, the Vendor by her action and conduct waived her right to

rescind the agreement. The time limit placed on the Purchaser to conclude the sale within one year was waived by the Vendor's inaction since 20.12.1987 and the legal notice dated 08.07.1993 lost its effect when she accepted the Tk.15,00,000/- on 15.02.1994. She has acquiesced to and waived the failure of the Purchaser to perform her part of the contract. By giving one month's time to perform, the Vendor effectively extended the time allowed for performance and allowed the period of limitation to be revived. Subsequently, by accepting Tk.15,00,000/- paid by the Purchaser on 15.02.1994, the Vendor waived the one month ultimatum given in her legal notice and the period of limitation recommenced.

The acceptance of a further instalment of the purchase money takes away the possibility on the part of the Vendor to rescind the contract. Moreover, the legal notice dated 29.07.96 cancelling the agreement itself indicates that the earlier time period stipulated had been extended by implication, and any rights accruing had been waived, otherwise, the last legal notice would not have been necessary. Hence, there was no question of the suit being barred by limitation. Moreover, it appears from the cross-examination of P.W.1 (deposing on behalf of the Vendor) that time was extended by the Vendor. The witness is recorded to have said, "I agree that $9\frac{1}{2}$ years were extended for completion of the deed of sale". In this connection the plaint of the Vendor in

Title Suit No. 28 of 1997, which later became Title Suit No.3 of 1998, states in paragraph No.14, "but she failed to carry out her part of the obligations under the agreement for last $9\frac{1}{2}$ years" and in paragraph No.15, "she had also failed to fulfil her obligation within the extended period of nine and $\frac{1}{2}$ years ($9\frac{1}{2}$ years)". The learned Counsel for the appellant emphatically submitted that the period for completion of the sale was admittedly extended by the Vendor for $9\frac{1}{2}$ years. From the plaint it cannot be said that the seller admitted to have extended the period by $9\frac{1}{2}$ years. The language used simply means that the Purchaser was unable to conclude the sale in spite of the fact that $9\frac{1}{2}$ years had elapsed. On the other hand, we cannot overlook the apparent admission of the Vendor's witness in cross-examination that $9\frac{1}{2}$ years were extended for completion. However, the fact that this was apparently stated in cross-examination should also be borne in mind. Nevertheless, as we have explained earlier, in our view the period of limitation was never crossed as the action of the Vendor from time to time effectively gave a new lease of life to the agreement.

Turning to the action of the Purchaser, we find that she also was not diligent in performing her part of the contract and apparently took full advantage of

the generosity of the Vendor in not having a termination clause in the agreement, nor pursuing the breach by the Purchaser to conclude the contract within the stipulated time and allowing the Vendor extraordinary latitude in performing her part of the agreement.

Performance of reciprocal promise:

The aspect of performance of reciprocal promise may be found in sections 51 to 54 of the Contract Act, 1872. It is provided in section 52 that the reciprocal promises shall be performed in the order as stipulated in the agreement. In other words, in the context of the instant case, the Purchaser was to obtain the Income Tax Clearance Certificate before the deed of sale could be prepared, and in order to obtain the Income Tax Clearance Certificate the Vendor had to perform her part by signing the necessary Form to be submitted to the Income Tax authority. Section 53 of the Contract Act provides as follows:

> **"Liability of party preventing event on which the contract is to take effect - When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may**

> **sustain in consequence of the non-performance of the contract".**

Thus, if it is claimed by the Purchaser that she was prevented from obtaining the Income Tax Clearance Certificate due to the failure of the Vendor to sign the necessary Form, then she could have taken steps to avoid the contract and to claim compensation. But she did not do so. On the other hand, the need to obtain Income Tax Clearance Certificate became redundant from 1st July, 1992 and yet the Vendor did not take any step to conclude the sale of the property in question.

Time of the Essence of Contract:

It is fortuitous for the Purchaser that the Vendor chose to send a legal notice to the Purchaser giving her one month within which to conclude the sale. It was argued that this ultimatum makes time of the essence of the contract. In this connection the provisions of the latter part of section 55 of the Contract Act may be referred:

> **"Effect of failure to perform at fixed time, in contract in which time is essential–When a party to contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of**

the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential–If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon–If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so".

It is conceptually established that in an agreeement for sale of immoveable property time is not of the essence of the contract, unless it can be held to be the unmistakable intention of the parties to make time of the essence of the contract. In the case of Hajee Saru Meah Sowdagar and another Vs. Musammat

Al-Haj Jahanara Begum and others, 8 DLR 616, relying upon the decision of the Privy Council in Jamshed Khodaram Irani Vs. Burjorji Dhunjibhai, 43 I.A. 26 that in a contract for sale of immoveable property the presumption for the purpose of specific performance is that time was not of the essence of the contract. It was held in the Hajee Saru Meah case that, "it is clear that the mere fixation of a period in the contract even when coupled with a power to treat the contract as cancelled, in the event of default in performance of the contract within the stipulated time, is not sufficient to make the time fixed of the essence of the contract". In that case the contract itself stipulated that in the event of non-performance for any fault or default on the part of the lessee in completing the contract within time stipulated therein, the agreement shall stand cancelled. In spite of such stipulation their Lordships observed that "the tendency of the Courts in cases of such contracts relating to real property is to lean against a construction which would make time of the essence of the contract unless it can be held to be the unmistakable intention of the parties". Reference was made to the decision in the case of Kali Das Ghosh Vs. Mungiram Bangur and Company, AIR (1955) Cal.298 that, "Even the mentioning of the fact that time should be deemed to be of the essence of the contract is not conclusive if it can be inferred from the subsequent

conduct of the parties that that was not the real intention of the party".

In the facts of the instant case it is clear that, although it was stipulated in the agreement that the contract for sale should be completed within a period of one year, the breach of such condition was sanctioned by the payment of the liquidated damages in the sum of Tk.5,00,000/-. Therefore, time was definitely not of the essence of the contract.

It must also be noted that the one month's ultimatum is an unilateral stipulation and it cannot be said that the Purchaser agreed to it. Even if the period of one month from 8.7.93 is taken to be the basis for performance of the agreement, then failure on the part of the Purchaser to conclude the sale in that period makes the agreement voidable. Even if at that stage time became of the essence of the contract, it is apparent that the Vendor did not take any action on or after 8.8.93 to cancel the agreement. On the contrary, her acceptance of Tk.15,00,000/- of the consideration money on 15.02.94 has negated the aspect of time being of the essence of the contract and effectively extended the period of limitation. Moreover, according to section 55 of the Contract Act, if it was the intention of the parties that the time should not be of the essence then the contract does not become voidable, but the promisee becomes entitled to receive compensation. Hence, it is our view that the Vendor is only entitled to receive compensation

for the delay in performance of the agreement by the Purchaser.

Reasonable time within which to conclude contract:

In cases where time is not of the essence of the contract the parties have a general right that the contract will be performed within a reasonable time. What is a reasonable time is not defined anywhere. However, it was observed in the Hajee Saru Meah's case that if there was unnecessary delay by any party, the other party could give him notice fixing a reasonable time after the expiration of which he would treat the contract as at an end. In the instant case, the vendor in the legal notice dated 8.7.93 stated inter alia as follows:

> **"If you are unable or fail to pay the balance purchase price along with the interest lost by my client, my client would have no other alternative but to regard the sale agreement as cancelled and sell the property to another buyer.**
>
> **I am, therefore, instructed to call upon you to pay the balance purchase price of Taka 7.5 lacs along with accumulated interest of Taka 13,69,660/- at the rate of 16% per annum over the last seven (sic) years from 01.01.87 to 31.06.93 (sic.) and a further sum of Taka 5 lacs as liquidated damages as stipulated in clause 6 (sic) of**

the sale agreement within one month of receipt of this letter. Your failure to do so will be deemed to be confirmation that you also wish to cancel the sale agreement and hand back possession of the property to my client".

However, from the record it transpires that, in spite of the one month ultimatum, the Purchaser paid a further sum of Tk.15,00,000/- towards the purchase price which the Vendor accepted on 15.02.94. Hence, the threat to treat the agreement as cancelled was waived. The Vendor by his second legal notice dated 29.07.96 terminated the agreement for sale. The witness deposing on behalf of the Purchaser stated that the amount of liquidated damages along with the outstanding balance of the purchase price was deposited with the vendor's representative, Advocate Salah Uddin Ahmed, who ultimately returned the amount of Tk.13,00,000/- which had been deposited with him, vide his letter dated 11.08.1996. The claim of the Purchaser is that she paid the full purchase price of the property as well as liquidated damages stipulated in the agreement before the vendor terminated the agreement. From the evidence on record, we do not find any reference to a date when the outstanding balance of the purchase price and the liquidated damages was actually paid over to Advocate Salah Uddin. On the other hand, there is a letter Ext.'E' in Title Suit No. 3 of 1998 from Advocate Salah Uddin Ahmed dated

11.08.96 addressed to Mr. Abul Khair (husband of the Purchaser), which indicates that he had received Tk.13,00,000/- from the Purchaser and was returning the same. This letter is of course dated 13 days after the agreement was terminated by the seller as mentioned in the second legal notice dated 29.07.96. Thus whether the amount was actually paid before the termination of the agreement can only be surmised in the absence of testimony by Advocate Salah Uddin Ahmed.

Be that as it may, the payment of balance purchase price is indicative of the Purchaser's continued willingness to perform his part of the agreement.

Specific Performance:

Specific performance of contract is regulated by Chapter II of the Specific Relief Act, 1877. It is a discretionary relief as provided by Section 12 of the said Act. The relevant portion of Section 12 may be quoted as follows:

> **"(a).....**
>
> **(b) When there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done;**
>
> **(c)When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or**

(d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation- Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of contract to transfer moveable property can be thus relieved".

It may be borne in mind at this stage that out of the total agreed purchase price of Tk.42,50,000/- the Purchaser paid 35,00,000/- upto 15.02.1994, which according to the deposition of the Vendor's witness, was invested for, "Industrial purpose of Free School Street Property. I don't know what's the rate of profit. If I would have kept this amount what amount I would get cannot say. The property which was purchased in the year 1995 is more higher value now-a-days". Thus we glean from the evidence of P.W.1, husband of the Vendor that with the advance purchase money paid by the Purchaser the Vendor invested in an industrial property in a Free School Street Property in the year 1995. The current value of the property is not disclosed by the evidence on record. Hence, the damage caused or gain made by the non-performance of the contract cannot be ascertained, either from the point of view of the Vendor who has invested the advance

received as a result of the agreement for sale, or from the point of view of the Purchaser who was unable to invest the said money advanced in any other property. It would also be difficult to ascertain the amount of compensation which would be adequate to compensate the loss incurred by the Purchaser if the performance of the agreement is not enforced.

The explanation to Section 12 of the said Act speaks of a rebuttable presumption that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. The Saru Meah Sowdagar's case cited above, is authority for saying that the onus of rebutting the presumption lies on the person who seeks to avoid the agreement. In the instant case the Vendor who seeks to avoid the agreement has not led any evidence to prove that the breach of the contract can be adequately compensated monetarily.

The learned Counsel appearing for the Vendor submits that the property prices have increased phenomenally since the time of the agreement till the present day and, as such, enforcing the agreement by way of specific performance would cause untold hardship to the Vendor.

In this regard the learned Counsel for the Purchaser has referred to the decision in the case of Anwara Begum Vs. Md. Karimul Haque and others reported in 5 BLC (AD) 119, wherein it has been held that hardship of the defendant is not a ground to refuse relief by way of specific performance. The learned Counsel further submits that it is only hardship which

existed at the time of the agreement which could be material and subsequent hardship cannot be taken into consideration to deny specific performance of contract. By reference to section 22 of the Specific Relief Act, the learned Counsel for the Purchaser submits that although a decree for specific performance of contract is a discretion of the Court, the discretion must be judicious and, unless the conditions mentioned in section 22.I and II are present in any given case, a decree of specific performance may not be refused by the Court. The learned Counsel points out that in the facts of the instant case, there is no question of the plaintiff having any unfair advantage; nor the performance would cause hardship on the defendant which she did not foresee; on the other hand, the learned Counsel submits, the plaintiff in this case has done substantial act by paying the whole of the purchase price as well as liquidated damages stipulated in the contract and, therefore, the trial Court properly exercised its discretion to decree specific performance of contract.

Long delay in performance of contract:

In the case of Ma Shwe Mya Vs. Maung Mo Hnaung, 63 I.C. 914 the facts show that nine years had elapsed between the date of the contract and the filing of the suit for specific performance. Their Lordships of the Privy Council observed as follows:

> **"It certainly is rather startling to be told that nine years after a contract has been made, which could have been satisfied within twelve months of its execution, a party to the contract is at liberty to take proceedings for specific performance of contract. The rights of equity which prevail in British Burma are rights which are given to people who are vigilant and not to those who sleep, and, unless there can be clearly established some reason which threw upon the defendant the entire blame for the delay that had occurred or unless indeed it can be shown that the real right of action had only accrued a short time before the proceedings were instituted, such a lapse of time would be fatal to any action for specific performance of contract".**

In the facts of the instant case, it appears that nine and half years had elapsed from the time of contract till the filing of the suit. However, the evidence on record tends to show, firstly, that the time was allowed to elapse with the express or tacit consent of the defendant (Vendor). Moreover, as we have noted earlier, the defendant by her conduct waived performance of the agreement within the time stipulated therein and also within the time stipulated in her first legal notice by accepting a further

instalment of the purchase price. Secondly, the defendant allowed two years to elapse in between February 1994, when Tk. 15,00,000/- had been paid and received, and 29.07.96 when the second legal notice was sent.

In the case of Mojibur Rahamn Vs. Bangladesh, represented by the Secretary, Ministry of Works reported in 47 DLR 232 it was held that "The cause of action for a suit for specific performance of contract arises when the person who executes the deed of agreement for sale refuses to act in accordance with the terms of the said agreement". Therefore, the cause of action of the instant case arose upon cancellation by the seller of the agreement for sale on 29.07.96.

Defence of Hardship:

On the question of hardship, this Division held in the case of Yousuf (Md) Vs. M A Wahab reported in 6 BLC (AD) 99 as follows:

> **"Defence of hardship cannot be accepted to defeat a suit for specific performance of contract in all cases. When hardship is on both the plaintiff and the defendant, it is for the Court to adjudicate the matter in exercise of its discretion. In the instant case, there is no case made out by the defendant that in the event of decreeing the suit he would be thrown on the street or have no other place to reside".**

In the facts of the case before us, the hardship expressed by the Vendor is that the price of the property in dispute has increased astronomically. The property now being worth crores of taka would, in accordance with the terms of the agreement of sale, be sold for the paltry sum of Tk.42,50,000/-. However, it must be borne in mind that the price agreed between the parties must have been reasonable when it was mutually agreed at arms length. On the other hand, there is hardship on the part of the Purchaser who had paid Tk.35,00,000/- of the purchase price, which was a large sum of money when it was paid, and that sum of money will now not be worth as much as it was worth in 1986, when Tk.20 lacs was paid, and in February 1994, when another sum of Tk.15 lacs was paid. In this regard we also have to take into account the fact that admittedly the Vendor invested the money in a valuable industrial property in the heart of Dhaka City which will also have increased in value astronomically. That it has in fact increased in value is admitted by the Vendor's witness.

Discretion of the Court to grant Specific Performance:

The Specific Relief Act provides that it is the discretion of the Court to grant specific performance of any contract. In the case of Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Bros., Delhi reported in AIR 1967 (SC) 249 it was held that, "the exercise of discretion by the trial Court should not

be interfered by the Appellate Court unless the exercise of discretion by the trial Court was not judicial or was unreasonable". It was held in that case as follows:

> **"If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion. As is often said, it is ordinarily not open to the appellate Court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate Court to interfere with the trial Court's exercise of discretion".**

Turning to the instant case, we find from the judgment of the trial Court that the learned Judge noted that there was no clause in the agreement that it would be cancelled for non-performance of any of the terms and that time was not of the essence of the contract and for these reasons the notice dated 29.07.96 cancelling the agreement was illegal. The

trial Court further found that the time for performance of the agreement was extended from time to time by the conduct of the parties, including acceptance by the Vendor of Tk.15,00,000/- on 15.02.94 and finally giving notice of cancellation of the agreement on 29.07.96. The claim of the Vendor that the suit for specific performance of contract was barred by limitation was therefore, not accepted.

On the other hand, the High Court Division laid emphasis on the fact that the Purchaser did not perform her part in obtaining Income Tax Clearance Certificate; showed herself as a tenant of the suit property thereby making the seller liable to Income Tax; did not conclude the deal within one month of the legal notice as stipulated therein and the fact that the non-performance of the contract by the Purchaser would result in the liability of the Vendor to pay extra transfer fee chargeable by RAJUK, since the value of the property as assessed by RAJUK would be much higher than that agreed by the parties many years previously.

However, we note from the agreement for sale that clearly it contemplates that all transfer fees, taxes, duties etc. shall be borne by the Purchaser. The cumulative effect of Clauses 2,3,4 and 6 is that the Vendor would not be liable for any costs incindental to the sale of the property. It is agreed by the parties that the registration fees and the transfer fee payable to DIT (RAJUK) shall be paid by the

Purchaser-Second Party and "the Vendor-First Party shall make no payment whatsoever on these two accounts".

Finally, there was a claim that the Vendor would be liable to pay tax on account of the Purchaser's claim to the Tax Authority that she was a tenant on the property paying rent, which would mean that the amount paid by her would be rental income to the Vendor and therefore taxable. However, there is no mention of this in the plaint of the Vendor, although it is mentioned on recall by the witness on behalf of the Vendor that the Income Tax Authority had imposed tax upon the Vendor. Ext.3 series were produced in support of such claim. His deposition, however, does not show that any amount of tax had actually been paid by the Vendor to the Tax Authority. With regard to the incidence of extra transfer fee which it is apprehended may be imposed by RAJUK, we are of the view that that cannot be a ground for rejecting the suit for specific performance of contract. In any event, according to the terms of the agreement, the Purchaser will be liable for any transfer fee payable to RAJUK.

One other point was urged for the first time at the time of moving the petition for leave and leave appears to have been granted to consider the effect of Section 53A of the Transfer of Property Act, 1882. The point was not elaborated before us. Suffice it to say that this provision is one that could be used to ward

off dispossession by the other party to the contract. Here, such a situation did not arise. Moreover, the point was not raised earlier and is not appropriate in a case where possession is sought through a proceeding in Court.

We also note that the High Court Division has made no mention of the admission of P.W.1 that the money advanced for the purchase of the property in the sum of Tk.35,00,000/- was invested by the Vendor for industrial purpose in a property in Free School Street. We take judicial note that the industrial investment in Free School Street will have earned a substantial increase in value.

In the light of the discussions made above, we are of the view that the judgment and decree passed by the High Court Division is not sustainable. Accordingly, the same is liable to be set aside.

The trial Court decreed the suit awarding compensation to be paid by the Purchaser to the tune of Tk.7,50,000/-, plus interest at the rate of 15% for 14 years, plus Tk.5,00,000/- of liquidated damages: in total Tk.28,25,000/-. However, we are of the view that the payment of compensation should reflect the benefit that the recipient would obtain by investing that sum of money had it been paid in due time. Also, as discussed above, there is a general right of performance within a reasonable time. Approximately twenty years have elapsed from 1992 when there was no further impediment in the way of completing the sale. In the facts of the instant case, on the basis that money put into long term investment would, more or less, double in five years, we calculate that the

seller is entitled to receive taka two crores by way of compensation.

We find merit in both the appeals and the same should be allowed. Accordingly, the Civil Appeal Nos.148 and 149 of 2007 are allowed. The impugned judgments and the decrees of the High Court Division are set-aside.

The judgment and decree passed by the trial Court is restored with modification of the amount of compensation which will now be Tk. two crores. The respondent is directed to execute and register the sale deed in question on receipt of this amount from the appellant within three months from date, failing which, the appellant will be at liberty to get the kabala deed executed and registered through Court on deposit of the said amount in Court. If the Purchaser fails to pay the amount ordered by us within the time allowed by us, then the agreement for sale in question shall stand cancelled and the Vendor will be entitled to regain vacant possession of the suit property within one month thereafter.

Let a copy of this judgment be transmitted to the trial Court, i.e. the Sub-Ordinate Judge (now Joint District Judge), Additional Court, Dhaka.

J.

J.

J.

The 11th January, 2012
H/B.R./* Words 9,270*